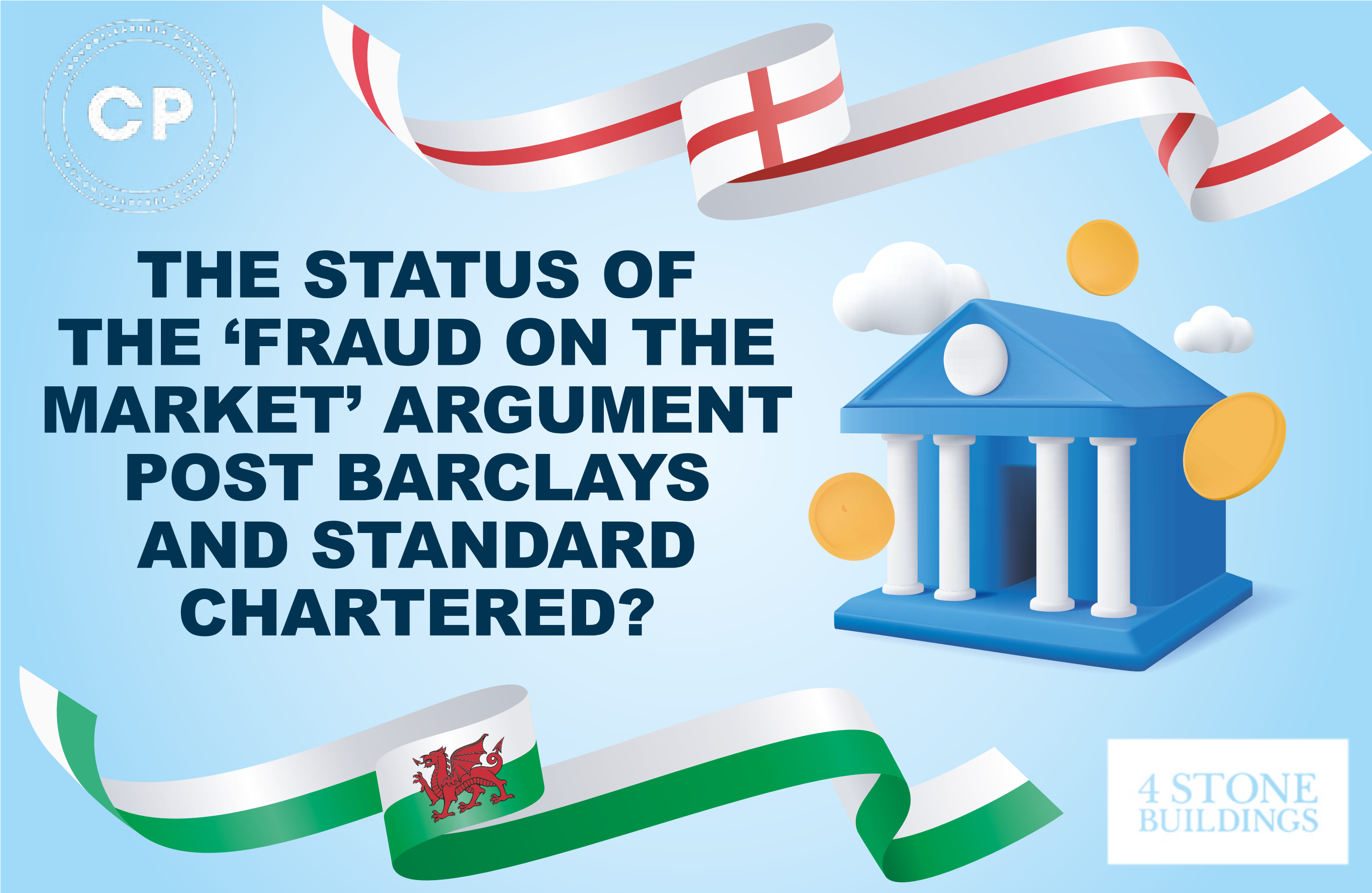

THE STATUS OF THE 'FRAUD ON THE MARKET' ARGUMENT POST BARCLAYS AND STANDARD CHARTERED?

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The landscape of securities litigation in England and Wales has been significantly influenced by two recent judicial decisions, particularly concerning the viability of the 'fraud on the market' argument under Section 90A of the Financial Services and Markets Act 2000. This article explores the implications of the High Court's rulings in Allianz Funds Multi-Strategy Trust and others v Barclays Plc [2024] EWHC 2710 (Ch) and Various Claimants v Standard Chartered PLC [2025] EWHC 698 (Ch), focusing on their impact on investors in tracker funds and with passive investment strategies.

Background On Section 90A And Schedule 10A

Section 90A and Schedule 10A of the Financial Services and Markets Act 2000 provide a statutory cause of action for investors in securities to claim compensation for loss resulting from untrue or misleading statements or dishonest omissions in certain published information relating to the securities, or a dishonest delay in publishing such information.

A critical element of this statutory framework is the requirement of reliance, which mandates that the investor must have acquired, held, or disposed of securities based on the information in question. This reliance requirement has been a focal point in recent litigation, particularly concerning the applicability of what is commonly referred to as the 'fraud on the market' theory. In the recent cases of Allianz Funds Multi-Strategy Trust and others v Barclays Plc and Various Claimants v Standard Chartered PLC the High Court considered whether 'fraud on the market' is sufficient to satisfy the reliance requirement.

The 'fraud on the market' argument is derived from the Efficient Markets Hypothesis which posits that the price of a security in an efficient market reflects all publicly available information. On this premise, an investor, when relying on the market price, is actually relying on the integrity of the price-sensitive publicly available information about the security in question, including the information published by the issuer. This provides a potential route through on reliance issues where the investor has relied on the market price in trading the security in question but has not read the relevant published information.

Fraud on the market is a concept familiar to securities litigators in other jurisdictions, in particular the United States.

The fraud on the market argument is of particular significance in the UK because tracker funds and passive investors represent a significant proportion of the UK investment market. Investors in those funds are not making buy or sell decisions for the individual securities and accordingly are not relying directly on information published by the issuer. There is an important question on whether such investors are able to claim under s.90A.

The Barclays Decision

In Barclays, investors brought claims against the bank in respect of certain express representations made in the published information and an implied representation that Barclays had not engaged in misconduct and had complied with its regulatory obligations.

The case concerned three categories of claimants:

- **Category A:** claimants who read and relied on the relevant published information directly;
- **Category B:** claimants who relied on the relevant published information indirectly through other sources which acted as a conduit for the substantive contents of the published information; and
- **Category C:** claimants who were alleged to have suffered losses solely as a consequence of movements in the share price of Barclays which reflected the published information, alleging that this amounted to indirect reliance on the published information.

The High Court considered whether 'fraud on the market' could satisfy the reliance requirement under Section 90A for category C claimants and in October 2024 ordered reverse summary judgment and strike out in relation to those claimants. Leech J held that:

- Parliament must have intended the reliance requirement to have some content, meaning that investors had to prove something more than that they suffered loss because of a false and misleading statement or omission being made to the market.
- Parliament intended the common law deceit test of reliance to apply to these claims.
- He agreed with the judgment of Hildyard J in ACL Netherlands BV v Lynch [2022] EWHC 1178 (Ch) (Autonomy) which found that the requirement for reliance cannot be satisfied in respect of a piece of published information which the acquirer did not consider at all.
- Therefore, category C claims could not satisfy the reliance test unless their representatives had read and considered the published information, or third parties who directed or influenced their investment decisions had read and considered the published information.

Interestingly, in January 2025 the Court of Appeal in Wirral Council v Indivior Plc/Reckitt [2025] EWCA Civ 40 said that Barclays represents the current state of the law. Was this a hint that the Court of Appeal is keen to consider the issue? The Court of Appeal's statement might explain the decision of Green J in Standard Chartered in March 2025 and his comment that this is "a live and possibly developing area of the law. The Barclays decision must have come as a surprise to many involved in this sort of securities litigation, as no other defendant had sought to strike out on that basis. It was probably anticipated that it would be appealed but as it turned out the case settled before an application for permission could be made to the Court of Appeal."

The Standard Chartered Case

In Standard Chartered, claims were brought by investors under Section 90A and Schedule 10A in respect of alleged misstatements in the bank's published information. The bank applied for strike out in respect of claims which were similar to the category C claims that were struck out in Barclays.

Green J refused to strike out the claims although he was careful to make clear that he was not convinced that Leech J was wrong that 'fraud on the market' could never satisfy the reliance requirement.

The Judge considered that there were potentially material distinctions between the cases advanced in Barclays and Standard Chartered in that the latter advanced a more extensive set of implied representations and the investors pleaded a "belief" in them, rather than the investors in Barclays merely "proceeding on the basis" that the implied representations were true.

The Judge went on to explain that:

- He had doubts if the common law test of reliance applied (mainly because it was unclear how it would apply to omissions and the law is still developing in relation to implied representations). He considered that such disputed legal questions should be resolved on the basis of actual facts established at trial, and not on assumed or hypothetical facts.
- He found that striking out the claims would not substantially reduce the burden of the trial as these claims would not materially increase the duration of the trial, and the parties had already spent time and costs preparing these claims for trial.

What Next For Passive Investors?

Following Barclays the general sentiment was that claims relying on 'fraud on the market' were bound to fail. Standard Chartered might offer some degree of hope that such claims may be brought.

Claims based on express representations remain susceptible to strike out but there is a better prospect for claims based on implied representations making it to trial.

In any event, the availability in principle of the fraud on the market argument is not the only challenge for passive investors. For a claim to succeed, claimants are likely to need to prove that the market price did reflect the published information, and that the fund's decision to acquire, continue to hold or dispose of shares was in reliance on the share price and not other qualitative factors, such as the company's ESG rating.